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(No. 244, October Term, 1899.)

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,

vs.

WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of Mississippi.

SUPPLEMENTAL REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
Of counsel for plaintiffs in error.

Washington, October 9, 1900.

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It is believed that a supplemental brief upon the point of jurisdiction may tend to simplify the issues and to save unnecessary labor on the part of the court.

Three questions arising under this point will be discussed, the remaining questions being covered by the brief already filed, viz.:

(1) Whether the language used in the fourth plea filed by the railroad companies, defendants below, was sufficient to raise the federal question under the contract clause.

(2) Whether the fourth plea raising the federal question was before the court below as presenting an issue of law and defense on the merits.

(3) Whether it was too late to set up the federal question on the second trial.

The action above entitled is a consolidated suit of five separate and distinct actions instituted by the state revenue agent, as plaintiff below, against the railroad companies, as defendants below, the first suit being for the

taxes of 1892, brought December 7, 1893; the second suit for the taxes of 1893 and 1894, brought December 18, 1894; the third suit for the taxes of 1895, brought January 1, 1896; the fourth suit for the taxes of 1896, brought December 18, 1896, and the fifth suit for the taxes of 1897, brought December 24, 1897 (record, pp. 1, 83, 106, 618, 629). The first three suits were by a consent order consolidated on July 21, 1896 (record, p. 106), and it was this consolidated suit which was tried on the first hearing in the inferior court and which was before the Supreme Court of Mississippi on the first appeal. The last two suits, for the taxes of 1896 and 1897, respectively, were not brought until after the first trial and the first appeal (record, pp. 504, 505). The judgment upon the first trial was in favor of the defendant railroad companies for the taxes of 1892, 1893 and 1894, and in favor of the state revenue agent, plaintiff below, only for the taxes of 1895 (record, pp. 107, 108). From this judgment there was an appeal taken by both parties—that is to say, a direct appeal by the revenue agent and a cross-appeal by the railroad companies—and the appellate court reversed the judgment on both appeals on the ground, among other things, that the verdict upon which it was based was inconsistent (record, p. 513). It also decided on the merits (1) that the charter contract was void because in conflict with the constitution of 1869; (2) that, if valid, it had been waived or lost by virtue of the consolidation of 1892; and (3) that it had been repealed by the laws of 1886, 1890 and 1892 (record, p. 671). As the court held that no contract existed, there was obviously no occasion to decide whether or not such a contract had been impaired by subsequent legislation. So far as the record shows, the federal question was not raised or decided on the first appeal.

When the consolidated suit, comprising only the first three suits above mentioned, came on for the second trial, the defendant railroad companies filed new pleas, of which the principal object was to specially set up the federal question. These pleas were stricken out by the court. The defendants thereupon excepted, and, withdrawing their other pleas, went to the state appellate court upon a bill of exceptions based upon the exception to the action of the court in striking out the pleas. After the pleas had been stricken out, the two new suits for the taxes of 1896 and 1897 were consolidated with the other suits, the order which was entered by consent stating (p. 610):

> "This order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, proceedings, and pleadings were all separate."

I.

AS TO WHETHER THE LANGUAGE USED IN THE FOURTH PLEA FILED BY THE RAILROAD COMPANIES, DEFENDANTS BELOW, WAS SUFFICIENT TO RAISE THE FEDERAL QUESTION UNDER THE CONTRACT CLAUSE.

The language used in the plea filed in the state court was sufficient to raise the federal question and to entitle the defendant railroad companies to the protection of the contract clause of the Constitution of the United States.

The language in question will be found in the record at page 566 and is as follows:

> "That this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract, and do impair the obligation of contracts."

Prior to this statement in the same plea, specific men-

tion had been made of statutes given effect by the suit and enacted after the charter contract of 1882. The defendant railroad companies thus clearly and unmistakably brought to the attention of the courts and of their adversary the fact that they relied on the protection of the contract clause, and there is no reasonable ground for suggesting that the language used tended to mislead, or failed to indicate the constitutional point clearly and unmistakably to court and counsel. The only plausible suggestion that can now be made is that, instead of the words "this suit by the plaintiff," the defendant railroad companies should have referred to the subsequent acts under and by virtue of which the suit was instituted and which were claimed to impair the contract. It is submitted that the expression used, taken in connection with the other portions of the same plea and the distinct statement of a violation of the contract clause of the Constitution of the United States, was sufficient. It certainly apprised the court of the point relied upon, and nothing more is necessary. Thus, in *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, Mr. Justice Shiras said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Particularly is this so where the case is included in the second class mentioned in section 709 of the Revised Statutes, where it is well settled that it is sufficient if it appear that the federal question was involved in the case. *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 485.

In addition to this wording of the plea, we have the

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certificate of the Chief Justice of Mississippi to the effect (record, p. 690):

> "That upon the said argument and hearing the validity of legislation . . subsequent to the statute of Mississippi of March 3rd, 1882 was drawn in question . . on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the United States, . . and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation."

This certificate would have made certain and specific what at most could be claimed to be indefinite. It conclusively shows that the exact constitutional point was raised, considered and decided. In *Roby* v. *Colehour*, 146 U. S. 153, 160, Mr. Justice Harlan, speaking of the effect to be given a similar certificate, said:

> "In view of the certificate by the Chief Justice of the state court, the office of which, as said in *Parmelee* v. *Lawrence* [11 Wall. 36, 39], was, as respects the Federal question, 'to make more certain and specific what is too general and indefinite in the record,' we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the Federal rights which that certificate states were claimed by Roby, but were withheld, and were intended to be withheld, from him by the court below."

II.

AS TO WHETHER THE FOURTH PLEA RAISING THE FEDERAL QUESTION WAS BEFORE THE COURT BELOW AS PRESENTING AN ISSUE OF LAW AND DEFENSE ON THE MERITS.

The fourth plea raising the federal question (record, p. 566) was treated by the Supreme Court of Mississippi, whose judgment is now under review, as in the case and as presenting an issue of law upon the merits. If the state supreme court considered the plea as a sufficient basis for its consideration of the merits, it is submitted that this court will follow the same course.

The judgment of the appellate court on the first appeal was not final in any sense; it could not have been reviewed in this court by writ of error; it did not order the entry of a judgment with directions to carry its terms into execution; on the contrary, it sustained the appeal of both parties, reversed the judgment and ordered a new trial on the merits. As was said by Chief Justice Waite in *McComb, Ex'r*, v. *Knox County Commissioners*, 91 U.S. 1, 2 (cited with approval in *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 342):

> "The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the Common Pleas to permit the parties to make a new case by amendment."

When the consolidated case came before the inferior court of original jurisdiction on the second trial, time was granted to the defendant railroad companies to prepare new pleas to meet the new aspect of the case arising under the decision of the appellate court, which reversed its previous decisions (record, p. 608). These pleas sought—particularly the fourth plea—to specially set up a federal defense under the contract clause of the Constitution of the United States, which question had not been decided by the state court on the first appeal. After the pleas had been filed, the plaintiff below moved to strike them from the files of the court upon various grounds, including the ground that they had been "improperly filed" and also the ground that "said pleas are no defense to the cause of action as it now stands before the court, and no one of them is any defense" (record, p. 606). This last ground of motion obviously went to the substantive merits of the pleas and

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not to any question of practice or leave to file or time or manner of filing.

The defendant in error here, plaintiff below, now contends that the motion to strike the pleas from the files was granted upon all the grounds specified in the notice of motion, and that those grounds included mere matters of practice involving no federal questions and not reviewable here. The certificate of the trial judge in the inferior court is printed in one of the briefs of counsel to the effect that he decided upon all the grounds; but this certificate and this alleged and disputed fact do not appear in the record. The attempt to add to the record in this mode is, of course, irregular, and will not be sanctioned. This court will look only to the decision of the state supreme court (*Allen* v. *Southern Pacific Railroad Co.*, 173 U. S. 479, 489; *San Pedro &c. Company* v. *United States*, 146 U. S. 120, 136). Confining ourselves, as we must, to the record, the question is whether it appears that the striking out of the pleas was upheld by the court below on the merits or on grounds of practice which precluded it from considering the merits.

The proceedings in the state appellate court, whose judgment is now under review, are most persuasive upon this point. Among other things, the court below, speaking of the action of the trial court, said that "the court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part" (record, p. 685). Had the state appellate court considered that the pleas were not before it because they had been properly stricken out on points of practice, and that there was, therefore, no defensive pleading raising any question on the merits and only a judgment *nil dicit*, equivalent

to a default, surely the court would not have discussed the points of law and the merits and have filed the opinion which we find in the record at pages 685–687. In addition to the evidence contained in this opinion showing that the state supreme court did consider that the pleas were before it on the merits, under the defendants' exception to the striking from the files, we have the certificate of the Chief Justice of the Supreme Court of Mississippi to the effect (record, p. 690) that "upon the argument and hearing the validity of legislation . . was drawn in question . . on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the United States in that such legislation and constitutional provisions impaired the obligation of a contract, . . and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation and such constitutional provisions," thus clearly showing that the case was argued and decided upon the merits. The fact that the opinion does not mention the federal question is quite immaterial; for, having decided that there was no existing contract, the court was not called upon to discuss the impairment of an alleged invalid contract. Nor has it yet been suggested that on the second appeal the court did not entertain and consider arguments on the merits, or that the railroad companies did not then most emphatically and unmistakably rely on the federal constitution and call the contract clause to the attention of the court. Indeed, the court, as the opinion shows, discussed at length points on the merits not disposed of in the former opinion (pp. 685 and 686).

The state supreme court had nothing before it on the second appeal except the pleas which had been stricken out. The other pleas had been withdrawn. It

must, therefore, of necessity have deemed that the exception of the defendant railroad companies to the striking out of the pleas properly presented for its consideration the question of law in the case. If, on the contrary, the court below had considered that the pleas were not before it because properly stricken out as filed without leave or otherwise improperly filed, or on any other ground of practice, then it would have had nothing before it raising the merits in any aspect, and it would, of course, not have considered and discussed the judgment on the merits.

But whatever may be said as to the original consolidated suit involving the taxes of 1892 to 1895, the new suits for the taxes of 1896 and 1897, were in an entirely different position. So far as these new suits were concerned, it was the first trial, and the pleas were in ample time and did not constitute in any sense an amendment of pleadings, as the pleas did in the prior suits. The consolidated order distinctly preserved all the rights which the defendant railroad companies would have had in the two new suits if there had been no consolidation, and the suits were all separate (record, p. 610). As to the new suits, therefore, the pleas must have been stricken out by the inferior court on the merits. The revenue agent seems to be in the extreme position of asserting that, although the pleas may have been stricken out on the merits as to the two new suits, the same decision struck out the same pleas on grounds of practice as to the three prior suits, with nothing in the record to indicate that there was any difference in the ruling with respect to any particular branches of the consolidated suit.

The consolidation order shows on its face that it was

"not to be construed to the prejudice of either party," and that all rights were to be preserved as if the suits "were all separate." It is impossible to interpret the consolidation order otherwise than as a recognition that the suits for the taxes of 1896 and 1897 were regarded by all concerned as then open to any defense upon the merits. If this were not so, and if the railroad companies were at the time of this consolidation actually in default, and not entitled to plead or to defend in these suits, it was folly to include them in the consolidation order under the language used. If there was an existing default, as is now claimed, the revenue agent was entitled to judgment thereon. His consent to the consolidation was an effectual waiver of this right, and he is estopped from now claiming the contrary. In no other way can the words "proceed as one suit," and "*pleadings* in one shall be appropriated to each and all of said cases, . . for each of said years 1892, 1893, 1894, 1895, 1896, and 1897," be given any intelligible meaning. It is noteworthy that the substance of this order of consolidation is the same as that of the order under which the first three suits were consolidated and tried (record, p. 106). This order was entered the day before the first trial by jury was begun, and evidently contemplated a controversy upon the merits; but its language is entirely unsuited to a default such as is now claimed existed when the order under consideration was entered.

The defendant practically contends that this consolidation order is to be construed to the prejudice of the defendants below in that at the time the order was entered the railroad companies were in default in the original consolidated case without any pleading whatever raising any question on the merits. It is inconceivable that the court or the parties then understood (July 8, 1898; record, p. 610)

that the effect of the last consolidation would be to deprive the railroad companies of any trial or hearing on the merits in the two last suits and place them in default for want of a pleading. The reasonable inference from the record undoubtedly is that all parties then recognized that the merits were duly presented in the original case under the exceptions to the striking of the pleas from the files, and there was consequently no necessity for a new trial. The language used was that "this order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party," &c. Yet, the position of the revenue agent now is that at that time the defendant railroad companies were in default for want of any pleading in all the suits, and not entitled to the advantage of any pleading or any hearing whatever on the merits.

To repeat, in the inferior court of original jurisdiction we find the record silent as to the ground upon which the pleas were stricken out; but, in the appellate court, whose judgment alone is now under review, the opinion of the court and the certificate of the Chief Justice show that the case was argued and decided upon the merits. The pleas stricken out alone presented the merits to that court, and consequently it must have considered that it was reviewing the ruling below to the effect that the pleas constituted no defense on the merits. If the state appellate court assumed the record to be sufficient in order to consider and decide the case on the merits, then the fair and reasonable conclusion should be that the merits were duly presented in the appellate court. If so treated by the court whose judgment is now under review, there can be no reason why this court should hold that there was absolutely nothing presenting the merits before such appellate court,

because the court might have sustained the motion to strike out the pleas on technical grounds of practice.

As was said by Mr. Justice Clifford in *Garnharts* v. *United States*, 16 Wall. 162, 165:

> "Suggestion is made that it does not appear upon what ground the order was made, which is all the worse for the prevailing party, as such an order can never be justified unless it was made for good cause appearing in the record. Where the record shows that the answer of the respondent was stricken out by the court, in a case in which the respondent was entitled to a trial by jury, and judgment was rendered against him as upon default, the court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a conclusion."

III.

AS TO WHETHER IT WAS TOO LATE TO SET UP THE FEDERAL QUESTION ON THE SECOND APPEAL.

The state revenue agent contends that notwithstanding that the federal question was not decided on the first appeal, the decision on that appeal constitutes *res adjudicata* upon this point even in respect of the suits for the taxes of 1896 and 1897, which had not been consolidated with the main suit and were not before the state supreme court at the time of the first appeal. It is submitted that the rule as to *res adjudicata* on second trials does not go so far as to prevent the making of new defenses on the new trial on points which were not decided on the first appeal, particularly in a case where a new trial on the merits is ordered and the court below is left with ample power to permit parties to make amendments of their pleadings. To repeat the language of Mr. Chief Justice Waite in *McComb, Ex'r*, v. *Knox County Commissioners*, *supra* (91 U. S. 1, 2, cited with approval in *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 342):

> "The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled, but ample power was left in the Common Pleas to permit the parties to make a new case by amendment."

In the case at bar, the federal question was not decided on the first appeal. In the pleadings then before the court, the defendant railroad companies relied upon their charter contract as valid and upon prior decisions of the Supreme Court of Mississippi which sustained their position. These prior decisions were overruled on the first appeal and the case sent down for a new trial on the merits. Thereupon the defendant below sought to present the federal question by a new plea. If the pleas were properly before the court below, as has been above argued, they presented a new defense under the federal constitution. The Supreme Court of Mississippi did not decide that it was too late to raise the federal question because the decision on the first appeal constituted *res adjudicata* even as to that defense. Had it so decided, a very serious question might be presented. But even in that case, it is doubtful whether such a decision that the prior ruling in the case was conclusive upon the federal point would prevent a party from securing a review of the case by this court and under the present writ of error which brings up the whole record. It may be said, as in *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S., 280, 284, that, while the Supreme Court of Mississippi might have felt itself precluded from re-examining the federal question on the second appeal, "no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record.

Upon such writ the entire case is before us for examination."

The narrow question to be considered by this court is whether the Supreme Court of Mississippi on the second appeal treated the case as open for discussion on the merits, particularly as to matters and points not previously adjudicated. If it did so treat the case, of course this court will review the decision thus reached by the state court. Mr. Chief Justice Fuller, in *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, 114, emphasized the fact that the state supreme court had not treated the case as re-opened.

It is submitted that the language of the opinion of the state supreme court on the second appeal in the case at bar fairly shows that the court did not decide that the prior appeal was *res adjudicata* as to the whole case, precluding it from a re-examination of the merits, but, on the contrary, that it considered new branches of the discussion on the merits.

The court below in its opinion used the following language (record, p. 685):

> "The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to disregard . . . that opinion. The futility of that sort of pleading needs no comment . . . The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files disposed effectively of such of these matters as are not here specifically adverted to."

The court then proceeded to examine and decide several points arising on the merits. It did not discuss the federal

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question because the conclusion of the prior opinion and of the new points discussed on the second appeal was that no contract existed to be impaired; but that the federal question was considered and actually decided on the second appeal conclusively appears by the certificate of the Chief Justice (p. 691). The intention of the court was undoubtedly to reaffirm the prior decision on the first appeal on the points there discussed; but, if the court had intended to rule the doctrine of *res adjudicata* which would have precluded it from considering new points, it is inconceivable that it would have proceeded to discuss and decide *new* points on the merits, as on pages 686 and 687, or have rendered a decision on the federal question, as certified by the Chief Justice (p. 691). The case of *Northern Pacific Railroad Co.* v. *Ellis*, 144 U. S. 458, would be in point if the Mississippi Supreme Court had placed its decision on the ground of *res adjudicata*, and had declined to reconsider the points of law involved in the merits.

The reason why the court below did not apply the rule of *res adjudicata* is twofold. In the first place, new points on the merits, including the federal point, were presented by the new pleas, and the decision on the prior appeal did not conclusively settle the case as to those new points. The rule in this court as to *res adjudicata* on second trials, for example, is "that whatever has been *decided* here upon one appeal cannot be re-examined in a subsequent appeal of the same suit" (*Supervisors* v. *Kennicott*, 94 U. S. 498, 499; *Clark* v. *Keith*, 106 U. S. 464, 465; *Chaffin* v. *Taylor*, 116 U. S. 567, 572; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456). In stating the rule, this court has always been most careful to limit the effect of the *res adjudicata* on second appeals in the same case to what had

been actually decided on the previous appeal and not to hold that parties would be precluded as to new points properly raised on the new trial. The second writ of error brings up for review such new points as are peculiar to the new trial (*Roberts* v. *Cooper*, 20 How. 467, 481), and this was done by the state supreme court in the case at bar. In the second place, the court did not apply the rule of *res adjudicata* because it could not in any fair or just aspect be applied to the suits for the taxes of 1896 and 1897. Indeed, strictly speaking, the second appeal presented a different suit from that involved on the first appeal. The new consolidated suit, comprising the two separate suits for the taxes of 1896 and 1897, was not the same suit which was before the court on the first appeal. As to those two suits and that portion of the new consolidated suit, there had been no prior appeal. If these two suits had been tried separately, the judgment in the main case on the first appeal would not have been *res adjudicata* on the federal question because the federal question had not been controverted and decided on the first appeal. It would have been held that a decision in the suit for taxes of one year is not *res adjudicata* in a subsequent suit for the taxes of another year unless the point was actually *controverted and decided* in the prior suit (*New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 401; *Werlein* v. *New Orleans*, 177 U. S. 390, 397). Moreover, the rule in Mississippi is that a decision in the suit for the taxes of one year is not *res adjudicata* in a subsequent suit for the taxes of another year. So the court distinctly held on the prior appeal, where it said (record, p. 657):

> "Nor are the taxes of any one year the same cause of action as the taxes of any other year, in the

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only proper technical signification to be given to the term *res adjudicata*. . . A decision for the taxes of any one year may be invoked under the doctrine of *stare decisis*, where the taxes of any other year are involved under the same claim. But certainly never, on any clear thinking or correct reasoning, under the doctrine of *res adjudicata*."

Washington, October 9, 1900.

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